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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 558

SOUTHERN RAILWAY COMPANY, CAROLINA AND NORTHWESTERN RAILWAY COMPANY, AND STATE UNIVERSITY RAILROAD COMPANY, *Appellants,*

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellees.*

REPLY OF APPELLANTS TO MOTION OF UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION AND MOTION OF OTHER APPELLEES TO AFFIRM.

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December 4, 1957.

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REPLY OF APPELLANTS TO MOTION OF UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION AND MOTION OF OTHER APPELLEES TO AFFIRM.

PRELIMINARY STATEMENT

This reply is to the Motion of the United States and Interstate Commerce Commission and the Motion of other appellees to affirm the judgment of the District Court.

The suit here involved is one to set aside an order of the Interstate Commerce Commission (a) depriving appellants of the right to their long-haul participation in through routes on fine coal from certain mining dis-

tricts to Southern Railway System destinations in North Carolina and South Carolina, without complying with the short-hauling provisions of section 15(4) of the Interstate Commerce Act, and (b) accomplishing the same purpose by equalizing, without complying with the reasonableness provisions of section 1 of the Act, the rates over the closed routes via the Clinchfield or Georgia railroads to the level of those over the open routes. The facts are stated in more detail in appellants' Jurisdictional Statement.

Under section 15(3) and (4) the Commission is authorized to require the establishment of through routes upon making certain findings which admittedly were not even attempted by the Commission in the present case, because it concluded that "through routes" were already in existence, and that the short-hauling restrictions in section 15(4) were, therefore, inapplicable.

In construing "through routes" in section 15 to mean that through routes were already in existence in the present case, the Commission brushed aside and departed from the tests which this Court has said represent a correct interpretation of the "through route" provisions of section 15(3) and (4).* These tests were as to the "holding out" by the carriers and the "through carriage" and "course of business" with respect to such routes.

In its report the Commission did not even refer to those tests but substituted a new one of its own, namely, that if a joint rate is in existence over a route, such route is a "through route". It so concluded regard-

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* See *Thompson* v. *United States*, 343 U.S. 549 (1952), and *Denver & Rio Grande West. R. Co.* v. *Union Pac. R. Co.*, 351 U.S. 321 (1956).

less of its own finding that since April 8, 1954, more than three years prior to its decision, there had been no movement of the commodity involved, fine coal, except a few shipments by mistake, and that the action of appellants "closed to traffic the higher rated routes as effectively as if schedules had been established with that sole objective" (299 I.C.C. at 339).

Tested by the statutory standards held by this Court to be proper, but not recognized by the Commission in its decision, it is believed that a realistic, common sense view of the facts leaves no doubt that the routes in question were closed, that this is in accord with the Commission's own findings that they were "closed", and that it was fundamental error to ignore the short-hauling restrictions in section 15(4) and to hold that they were inapplicable.

The error in disregarding section 15(4) alone invalidates the Commission's order. However, the attempt of the Commission to equalize rates over the closed routes with those over appellants' open long-haul routes, by resort to its power to prescribe reasonable maximum rates, is based upon erroneous grounds, invalidating its order. Section 15a(2) has been misconstrued. No finding is made that the lower rates to which equalization is required are reasonable maximum rates. There is no finding that the higher prescribed level in the former case could be ignored in favor of depressed rates over alternate routes as the result of competition. For these and other reasons referred to herein and in the Jurisdictional Statement, the order is invalid.

The misconstruction of the short-hauling provisions in the present case is highly damaging to appellants

in depriving them of their long-haul rights which Congress has expressly provided for in section 15(4)—a section with which the Commission over a period of many years has been unsympathetic and as to which it has sought unsuccessfully to have the short-hauling restrictions on its powers eliminated.

It is highly important that appellants in efficiently operating their properties and giving the public the benefit of lower rates be able to protect their long hauls, as provided in section 15(4). In this manner special low commodity rates justifiable over long-haul routes may be published in the public interest, without keeping open all routes applicable under class rates or under a generic classification such as the higher rates on "all kinds of coal" over the closed routes in the present case.

The Motions of appellees, it is respectfully submitted, should be denied.

ARGUMENT

I. CASE INVOLVES WRONG CONSTRUCTION BY COMMISSION OF SHORT-HAULING PROVISIONS OF STATUTE—NOT FACTUAL ADMINISTRATIVE FINALITY DETERMINATION

The present case is highly important because it involves an erroneous construction of the short-hauling provisions of section 15(4) of the Interstate Commerce Act, and unjustly strips appellant railroads of rights intended by Congress to be granted them and intended to be protected from administrative curtailment unless upon compliance with the requirements of this section.

Both the Government and the other appellees in their motions seek to sustain the Commission's conclusion "that the routes in question are through routes within the meaning of section 15 of the act" (299 I.C.C. at 337), and therefore section 15(4) is inappli-

cable, on the theory that the question is merely "one of fact" (Government's motion, p. 8, other appellees' motion, p. 10).

The Government, however, in view of the Commission's own finding that appellants by their tariff, effective April 8, 1954, "closed to traffic the higher rated routes as effectively as if schedules had been established with that sole objective" (299 I.C.C. at 339), said:

> "We agree that the Commission found, among other things, that * * * the routes have been effectively closed to fine coal traffic." (p. 12)

The Government then says:

> "But the Commission also found explicitly that these same routes were in existence, hence were never eliminated *in any legal sense*" (id.; Emphasis supplied).

Thus in spite of the actual factual situation that the routes in question were closed, the argument of the Government is that they were not closed in a "legal sense", which means as the Commission *construes* the statute.

While appellants recognize that it is in the public interest that an administrative agency such as the Commission should not be overturned where its discretion is exercised within statutory and constitutional limits, it is basically important in our system of government that administrative agencies be not allowed to rule on the law itself and thus be free from judicial or other restraint. The Administrative Procedure Act (5 U.S.C., section 1, et seq.) gives emphasis to this purpose.

The fundamental principle is clearly stated in *Social Security Board* v. *Nierotko*, 327 U.S. 358, 369 (1946), where the Court pointed out that—

> "An agency may not finally decide the limits of its statutory power. That is a judicial function."

Numerous cases are cited by the Court in a footnote, including *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475, 489 (1942), in which an order of the Interstate Commerce Commission was held to be invalid. There the Court in recognizing the importance of the judicial function said:

> "Congress has made a grant of rights to carriers such as appellee. Congress has prescribed statutory standards pursuant to which those rights are to be determined. Neither the Court nor the Commission is warranted in departing from those standards because of any doubts which may exist as to the wisdom of following the course which Congress has chosen. Congress has also provided for judicial review as an additional assurance that its policies be executed."

See also *East Texas Motor Fr. Lines* v. *Frozen Food Express*, 351 U.S. 49 (1956), in which the Court in holding an order of the Commission invalid said that (p. 54)—

> "Congress has placed limits on its statutory powers; and our duty on judicial review is to determine those limits".

The *Nierotko case* is cited.

The Commission over a long period of time has looked with disfavor on the short-hauling provisions section 15(4) of the Act and has recommended, on

numerous occasions, elimination of the restrictions on its power to require short-hauling. As recently as 1952 the Commission supported a bill to accomplish this result. (Senate Hearings on S.2782, April 21, 1952, 82nd Cong. 2nd Sess.). In every instance Congress declined to follow the Commission's recommendations, and thus recognized and emphasized the importance of preserving the rights of railroads to their long hauls.

Misconstruction of the short-hauling provisions of section 15(4) resulted in the invalidation of the Commission's orders in *United States* v. *Missouri Pac. R. Co.*, 278 U.S. 269 (1929), and *Thompson* v. *United States*, 343 U.S. 549 (1952). In the latter case this Court pointed out that the "Commission's effort to limit by construction the impact of the short-hauling restriction on its power to establish through routes was rejected" in the *Missouri Pacific case*. The Court further pointed out attempts by the Commission to have Congress "delete completely the short-hauling restriction" and the refusal of Congress to do so (p. 555). See also the comments of Mr. Justice Frankfurter in his dissenting opinion in *Denver & Rio Grande West. R. Co.* v. *Union Pac. R. Co.*, 351 U.S. 321, 336-337 (1956).

This legislative background, appellants believe, makes it particularly important in the present case to review the Commission's order and requires compliance with the statute.

The Thompson case. Appellees seek to escape the force of this Court's decision in the *Thompson case*, 343 U.S. 549, supra, which is dealt with in some detail in the Jurisdictional Statement (pp. 16-24). They overlook that the case, like the present one, involves a

construction of the meaning of section 15(4) of the Act, and more particularly the meaning of the term "through route" in that section as distinguished from a mere factual determination. The Court said (p. 560):

> "We hold that the Commission's efforts to support its finding that a through route from Lenora to Omaha via the Burlington line already exists are *inconsistent with the meaning of the term* 'through route' as used in the Interstate Commerce Act" (Emphasis supplied).

The Court stated "the accepted tests for determining the existence of a through route" and held that applying those tests the Commission's order was "without evidentiary support" (p. 561) and its theory, if approved, would require "an unwarranted distortion of the statutory pattern" (p. 559). As to the test to apply the Court said (p. 557):

> "In short, the test of the existence of a 'through route' is whether the participating carriers *hold themselves out* as offering through transportation service. *Through carriage* implies the existence of a through route *whatever the form of the rates* charged for the through service" (Emphasis supplied).

In applying the tests, "the carrier's course of business" is to be considered (p. 557). As compared with the present case, it is to be noted:

(1) In that case, there was a physical connection between the Missouri Pacific and the Burlington over the route sought to be opened by the Commission and cars of the commodity in question, grain, could be physically hauled over the entire route. Such physical usability was held to be no basis for finding the existence of a through route. Physical usability in the

present case is likewise of no legal significance, and such a test, as the Court pointed out, would mean practical nullification of the short-hauling provisions of the Act because such contention could be made as to nearly every route in this country.

(2) The Missouri Pacific-Burlington route in the *Thompson case* was not used from Lenora, Kans., to Omaha, Nebr., because the combination rate thereover was 30 cents per hundred pounds, or 4.5 cents higher than the rate over the Missouri Pacific single-line route to Omaha, and 11 cents higher than the rate over the Missouri Pacific route to Kansas City (pp. 551, 553). The traffic did not move over the Missouri Pacific-Burlington route because of the higher rate applicable and not because of any physical condition. The route was in fact "commercially closed" by reason of the higher rates.* In the present case, as the Commission found, the rates via the Clinchfield or Georgia routes "are too high to move fine coal from and to the points under consideration" and the routes are effectively "closed" (299 I.C.C., at p. 339).

(3) In that case the fact that the Missouri Pacific single-line route to Omaha was one-third longer than the two-line route sought to be opened (278 I.C.C., at p. 520) was no obstacle to recognition of the Missouri Pacific's long-haul route. In the present case longer distances via the Southern open routes are likewise not significant.

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* See *Omaha Grain Exc. of Omaha, Nebr.* v. *Missouri Pac. R. Co.*, 272 I.C.C. 368, 371, 372, in which no movement of grain because of the higher rates is referred to, and in the later decision, 278 I.C.C., at p. 523, the Commission said, complainant "can use them [the Missouri Pacific-Burlington routes] if it elects to pay the excessive combination rates in effect over such routes".

(4) In that case the fact that grain moved under joint rates in through service over the Missouri Pacific and Burlington "to points short of Omaha" was held to be no evidence of a through route to Omaha (p. 559). In the present case the evidence as to movement of coal *other than fine coal* or of *other commodities* via the Clinchfield or Georgia routes between the points involved is no basis whatever for a through-route finding.

(5) In that case the physical availability of the Missouri Pacific-Burlington route and the 30 cent combination rate thereover did not constitute the "holding out" required to establish a through route. The rate situation was such as to forbid the movement of traffic. This was the situation as to the higher rates over the Clinchfield and Georgia routes in the present case.

(6) In that case there was no actual "carriage" of grain over the Missouri Pacific-Burlington route and such carriage was negatived by "the course of business" of the carriers involved. The same is true as to the Clinchfield and Georgia routes in the present case. While appellees seek to distinguish the two cases on the ground that in that case there had never been a movement of grain over the entire Missouri Pacific-Burlington route, the actual-carriage and course-of-business test is equally applicable in the present case, where there can be no doubt, as the Commission found, that since April 8, 1954, the routes via the Clinchfield and Georgia were "closed".

(7) While combination rates were involved in the *Thompson case,* and joint rates are involved in the present case, in that case "through carriage" was held to be a test of the existence of a through route "whatever the form of the rates charged for the through

service". With no through carriage and no actual holding out, it is immaterial that the rates via the Clinchfield or Georgia routes are joint rates.

For similar reasons the attempt of appellees to distinguish the *D&RGW case*, 351 U.S. 321, supra, is fallacious. The Court took pains in that case to reaffirm the tests set forth in the *Thompson case*. There the tests were held to have been complied with. In the present case they have not, and a misconception of the meaning of "through route" as used in section 15(4) has been substituted for such tests.

Appellees' claimed support for the through-route finding. The contentions made by the Government and other appellees that the Commission's through route finding is amply supported are similar. Particular attention here will be given to the Government's contentions.

(1) The Government contends that the Clinchfield and Georgia routes have been "recognized and utilized as through routes for the transportation of all sizes of coal, including fine coal, at joint commodity rates for many years prior to April 8, 1954" (p. 11).*

That fine coal moved over the Clinchfield or Georgia routes under the generic description, "all sizes of coal",

* In erroneously seeking to meet appellants' argument concerning class rates and rates under generic descriptions, railroad appellees argue that the route here involved "has been continuously used over a long period of time in the transportation of the commodity involved" (p. 18). The commodity here involved is "fine coal" which is a separate and distinct commodity from the generic description, coal of all sizes, applicable over the closed routes. After April 8, 1954, the closed routes were not "continuously used" in the transportation of fine coal, and the Commission so found.

prior to April 8, 1954, is of no significance. Not until April 8, 1954, did appellants close those routes and the Commission itself found that the action on that date "closed to traffic the higher rated routes [via the Clinchfield or Georgia] as effectively as if schedules had been established with that sole objective" (299 I.C.C. at 339). The Commission also found that following such action "fine coal from the origin groups under consideration, except for a few shipments made by mistake, has not been moving over routes including the lines of the Clinchfield or the Georgia Railroad" (id., p. 337). Thus in accordance with the "actual carriage" test and the "course of business" test it is clear from the Commission's own findings that after April 8, 1954, the routes in question were closed and could not be properly considered as existing "through routes". The trouble is, that the Commission threw those tests to the winds.

(2) The Government contends that "These long-standing through routes and joint rates were not cancelled by tariff publication, and both before and after April 8, 1954, joint rates on all sizes of coal, including fine coal, have been and still are in effect over them" (p. 11).

The contention that "through routes and joint rates were not cancelled" as to "all sizes of coal" overlooks that as to fine coal, the commodity here involved, the Commission itself found, as just indicated, that the routes were as effectively "closed" "as if schedules had been established with that sole objective". For all practical purposes the *fine* coal rates and routes via Clinchfield or Georgia were thus cancelled and rendered ineffective.

"Continuance after April 8, 1954, of joint rates on all sizes of coal is no support for the through-route finding. Whatever "the form of the rates", as previously indicated in dealing with the *Thompson case*, the real tests are the "holding out" and "actual carriage" or "course of business" tests. Appellants in taking "fine coal" out of the general classification of "all sizes of coal" and specifically publishing, with the consent of its connections, the lower rates on this commodity over its open routes intended that that commodity should move only over those open routes. This was clearly understood by all concerned. There was no solicitation by appellants or other carriers over the Clinchfield and Georgia routes, and, as indicated, application of "actual carriage" or "course of business" tests showed that movement of fine coal over those routes had been stopped. Irrespective of the joint rates published on the general description of all sizes of coal over the Clinchfield or Georgia routes, the opposing carriers themselves recognized in the proceeding before the Commission that the routes had been closed. This was clear also from the meager testimony of shipper witnesses (R. 156, 161, 162, 228).

Appellees try to avoid the effect of the admission in the prayer of the complaint of opposing railroads before the Commission seeking an order "requiring the *reinstatement*" of the Clinchfield and Georgia routes "*eliminated* by the action of the Southern Railway" (emphasis supplied). They overlook and fail to mention that such reinstatement of routes was sought under "section 15(3) of the Act" (see Jurisdictional Statement, p. 15). Section 15(4), of course, is to be read in connection with, and is a limitation on the Commission's powers under section 15(3). The Govern-

ment does not deny and the other appellees are unable to show error in the Jurisdictional Statement giving reference to opposing railroad testimony "that the Clinchfield and Georgia routes 'were closed', were 'commercially closed', were 'made unavailable' and were 'discontinued' (Witness Roby, R. 99, 104, 118, 187, 188, 195, and exhibit 20, column 1)." But in any event, they cannot deny that the Commission itself found that the routes were "closed".

(3) The Government further contends that the movement of sizes of coal other than "fine coal", the commodity here involved, over the Clinchfield or Georgia routes shows that such routes are through routes with respect to fine coal*.

The other appellees make a like argument (pp. 7, 13). This is indeed extraordinary reasoning. It is utterly repugnant to common sense to assume that because a through route may be open as to one commodity, for example, apples, a through route over the same lines is open as to another commodity, for example, grain. The same type of reasoning was rejected in the *Thompson case* where movements of grain over the Missouri Pacific-Burlington route under joint rates to points just short of Omaha were held not to be evidence of a through route all the way from point of origin to Omaha. Such reasoning would mean an

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* The Government contention is (p. 11):

"(3) Although the availability of lower rates on fine coal over the alternate routes since April 8, 1954, has rendered the routes via the Clinchfield or the Georgia Railroad commercially undesirable for the movement of fine coal, other sizes of coal have continued to move over them at joint commodity rates and a few shipments of fine coal have done so."

utter nullification of the short-hauling provisions of section 15(4).*

The Government in making its point (3) apparently attempts to discount the Commission's finding that the higher rated routes were "closed". It refers to those routes as "commercially undesirable" and argues "a few shipments of fine coal" have moved over those routes (p. 11). Yet on the next page the Government admits that "the routes have been effectively closed to fine coal traffic". This is necessary in view of the Commission's findings above referred to (299 I.C.C. at 339).

The Government further attempts to make a distinction on the theory that "commercially closed" means something different from the meaning of a closed through route under section 15(4). The lower Court accepted this erroneous theory.* However, it will be noted that in the *Thompson case* the routes were not physically closed but were commercially closed because

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*Railroad appellees apparently emphasizing traffic from the Harlan district on the L&N state (pp. 7-8) that during "four months of 1952 approximately 45 percent of all coal which moved to North Carolina and South Carolina from the Harlan group was routed in connection with the Clinchfield Railroad" but in a footnote concede that this "percentage includes coal destined to points not served by appellants". The exhibit relied upon (No. 34) shows that the 45 percent of the total comprised 3,471 cars in the four months shown for 1952. What was fine coal and what was other than fine coal is not shown. However, exhibit 20 submitted by an L&N witness shows that in January and February, 1954, prior to the closing of the Clinchfield route in connection with the Southern, only 85 cars moved over that route to Southern stations. This indicates the relatively small volume of fine coal traffic formerly moving via the Clinchfield route to Southern destinations here involved and the overwhelming proportion moving to destinations not here involved.

Also to be noted is the fact that the L&N from the Harlan mines has its long haul (182 miles) via the Knoxville open route as compared with a haul less than half (90 miles) if its haul were via the closed Clinchfield route (Ex. 19, p. 2).

of the higher rates over the Missouri Pacific-Burlington route and that in the *Denver & Rio Grande case* the routes held not to be through routes were shown to be "commercially" closed (351 U.S., at p. 330).*

Appellees rely upon the *Virginian case*, 272 U.S. 658. The Commission based its order which was reviewed in the *Thompson case* on that decision (278 I.C.C., at p. 523). The Government relied heavily on it in the *Thompson case* but the Court held against the contention. An opposite contention as to the applicability of the *Virginian case* was made by the Government in the *Denver & Rio Grande case*. Now the Government reverses itself and returns in substance to the erroneous contention made in the *Thompson case*. No alternate routes were involved in the *Virginian case*. Section 3, the discrimination section, was availed of by the Commission, and this makes inapplicable the short-hauling provisions of the Act. The case is no authority whatever against appellants.**

Appellees also rely on the *Great Northern case*, 343 U.S. 562 (Government pp. 11-13, other appellees, p. 13). One route was there before the Court. It was extensively utilized, and there was no alternate route. The Court said that the short-hauling provisions of the Act were not involved. The case is no authority here.

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* The Court referred to the Commission's finding that the "course of conduct" of the Union Pacific was "not [to] open *commercially* the Rio Grande routes on this traffic" (Emphasis supplied).

** The Government (p. 6) and other appellees (p. 7) argue that rate relationships between the various origin groups were destroyed by Southern's action in reducing rates on April 8, 1954. This is not true. After April 8, 1954, each of the origin groups continued to have the benefit of the 35 cent rate reduction in fine coal and continued in the same relationship, routes being open and used via Knoxville and Appalachia just as they have always been.

The other *Great Northern case*, 81 F. Supp. 921, 336 U.S. 933, involved transit privileges. The facts are so different from those here involved that the case is of no legal significance.

Both the Government and other appellees apparently recognize the weakness of their theory that the mere existence of joint rates over the Clinchfield and Georgia railroads makes them participants in existing through routes, because they resort to other arguments, such as that there was movement of coal prior to April 8, 1954, and movement of coal other than fine coal thereafter. Those arguments, as pointed out above, are also unsound.

The joint-rate theory is brought to a *reductio ad absurdum* by noting the class rate situation in respect to joint rates, referred to in the Jurisdictional Statement, pp. 21-24. Class rates apply without route restriction, and there are in this country "literally millions of routes" *Class Rates in the United States*, 294 I.C.C. 662, 666. Such joint rates having general application, like the general purpose rates on "all sizes of coal" prescribed in the *Carolina Coal Consumers case*, 270 I.C.C. 291, cannot be cancelled by a carrier publishing a lower commodity rate applicable to a particular commodity. *To hold that all of the class rate routes are open merely because joint rates are applicable thereover and that the Commission may equalize those rates with the commodity rate without regard to the short-hauling provision of section 15(4) would be devastating to the short-hauling restrictions on the Commission's power.* It would be similar to the Commission's unsuccessful attempt to hold in the *Thompson case* that physical availability of a route justifies a finding of the existence of a through route. Both theories are contrary to sound logic and common sense and do

violence to the statutory standards carefully provided by Congress.

The Commission's misconstruction of the provisions of section 15(4) of the Act, in holding that it is inapplicable, is a basic error of law rendering the Commission's order invalid.

II. FUNDAMENTAL ERRORS IN THE COMMISSION'S PRESCRIBED EQUALIZATION OF RATES UNDER THE THEORY OF ITS RATE-MAKING POWERS UNDER SECTION 1 OF THE ACT

While appellants believe that the errors of the Commission in misconstruing the short-hauling provisions of section 15(4) alone invalidate the Commission's order, and that the Court need go no further than those errors to set aside the order, nevertheless, the Commission has departed from legislative standards in prescribing rates over the closed routes on the same level as the rates over the open routes in which Southern participates in preserving its long hauls.

Appellees contend that the Commission was not in error in relying, as it clearly did, on the provisions of section 15a(2) of the Act. They overlook that the provisions as to taking into account the movement of traffic were directed towards the rate-making element of value-of-service, and have no application to an alternate route case such as the present one. The Commission itself in a previous case, *Cotton Transit at Shelby, N. C.*, 253 I.C.C. 586, reached a similar conclusion. There it was contended that extra charges over a route via Shelby, N. C., as compared with other routes to the same destinations impeded or prevented the flow of traffic via Shelby. In spite of the contention of the protestant that unreasonableness should have been

found by applying the rate-making test provided for in section 15a, the Commission found that the test was inapplicable because the traffic would continue to move via the other routes.* The Commission made plain that not just the traffic that might move over the Shelby route should be considered but instead the entire movement from origin to destination. The important consideration is as to the "total tonnage". *Reduced Rates on Coal from the East to the Northwest,* 292 I.C.C. 119, 135. The purpose is related to that of the Hoch-Smith Resolution (49 U.S.C., sec. 55) as to making rates "to the end that commodities may freely move"—not that movement may be provided over any particular routes or all routes between the same points.

The further finding by the Commission in reliance upon section 15a that "there is before us clear and convincing evidence that rates will produce more revenue if fixed at a lower rather than a higher level" (p. 339), disregards the fact that increased revenue over one route will reduce the revenue over the other route.

In addition from certain coal fields, for example, the Harlan district, the evidence showed movement of fine coal over the Clinchfield route to destinations here in-

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* The Commission said (p. 589):

"Protestant also contends that the proposed charge would not meet the *test of reasonableness found in section 15a of the act*. That section provides that, in the exercise of its power to prescribe just and reasonable rates, the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed. Even if *all* of the traffic under consideration should be diverted from Shelby because of the proposed extra charge, the record indicates that it *would continue to move* to and from warehousing points on the Southern." (Emphasis supplied).

volved, amounting in all to hardly more than one car a day for the entire district, prior to the closing of the route on April 8, 1954, and there was no showing of an increased movement if the route had been opened after that date.*

Railroad appellees contend that the words in section 15a as to the movement of traffic "by the carrier or carriers for which the rates are prescribed" indicates that the Commission had authority to rely on this section in the present case.

Those provisions, however, were added in the 1940 amendment to the Act in order to make clear another purpose, namely, that the Commission "may not require one carrier or group of carriers to maintain rates for the purpose of protecting the traffic of others". *Dressed Poultry From Omaha, Nebr., to Austin, Minn.*, 246 I.C.C. 270, 272; *Automobiles From Detroit to the East*, 288 I.C.C. 351, 356; *Merchandise Freight From Washington and Va. to South*, 270 I.C.C. 487, 493; and *New Automobiles in Interstate Commerce*, 259 I.C.C. 475, 538.

The Government argues that even if section 15a was misconstrued, this would not invalidate the order (p. 17). The report, however, shows that the Commission heavily relied upon this section, and it was evidently

* Exhibit 20 introduced by opposing railroads in the Commission proceeding purported to show the movement of fine coal from the Harlan district via the Clinchfield route to destinations on the Southern in North Carolina and South Carolina in the months of January and February, 1954. The total was *only* 85 cars of fine coal, or 1.4 cars per day for the entire district. The principal shipper witness said as to the existing Southern route: "I like it. I have no intention, even if the route is restored, of trying to get any coal routed over the other way" (R. 156).

"an important factor in the conclusions reached." The order should, therefore, be invalidated. *United States* v. *Abilene & S. Ry. Co.*, 265 U.S. 274, 290 (1924).

Appellees rely on the *Virginian case* in support of the prescription of the lower rates by the Clinchfield and Georgia routes. In that case, however, as pointed out in the Jurisdictional Statement, it is highly significant that the Commission expressly found that the compared rates "afford a standard of reasonableness" (98 I.C.C. 488, 496), while there is utterly lacking here any finding that the lower rates to the level of which reductions were required are *reasonable maximum rates.* Absence of such a finding is a fatal flaw in the report and order here in question. There can be no dispute that in the exercise of its managerial discretion a railroad is free to establish rates which are lower than reasonable maximum rates but which the Commission itself may not require (*United States* v. *Chicago, M., St., P. & P. Co.*, 294 U.S. 499, 506 (1935)).

The absence of a finding that the reduced rates are maximum reasonable rates is a particularly serious error, because the rates on all sizes of coal, including fine coal, over the Clinchfield and Georgia routes were prescribed by the Commission in the *Carolina Coal Consumers Conference case*, 270 I.C.C. 291, and no finding was made that departure from the rates prescribed therein is justified or that the rates thus prescribed are above reasonable maximum rates.* The

* The railroad appellees contend (p. 25) that the Commission in certain coke cases made reductions from earlier levels prescribed and that such action indicates that the Commission could do so in the present case. Unlike the present case, however, the Commission in those cases took pains in prescribing the lower rates to vacate the previous orders in so far as they were in "conflict with"

standard of reasonableness there prescribed is still the standard of maximum reasonableness.*.

Appellees apparently do not deny the general rule of the Commission as to alternate routes by railroad—a rule violated here. The Commission has repeatedly held "that the existence of a lower rate between the same points over a route other than the route of movement does not of itself establish the unreasonableness of the higher rate" *McHenry-Millhouse Mfg. Co.* v. *N. Y., O. & W. Ry. Co.*, 151 I.C.C. 501, 502.**

The Government cites a number of cases (p. 16) as to rate comparisons but none of these involved alternate rail route comparisons.

The Commission's order is also violative of the well-recognized principle that rates depressed because of

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or "inconsistent with" the order prescribing the lower rates (194 I.C.C. 640, 679; 208 I.C.C. 281, 290).

The railroad appellees also seek to rely upon the *Class Rate case*, 262 I.C.C. 447, 264 I.C.C. 41, involving a change from merely ad interim rates on a comprehensive record as to costs, traffic movement, and other facts, as compared with the superficial and generalized treatment given the present case.

* Railroad appellees argue that there is something "anomolous" in the closing of a route which has been a rate-making route. This overlooks the well established principle "that carriers cannot be required to short haul themselves" and "that a rate-making route need not be an open route". *Routing via Hampton & B. R.*, 148 I.C.C. 547, 551.

** Among numerous other cases to the same effect, see *Armstrong Tire & Rubber Co.* v. *Illinois Central R. Co.*, 289 I.C.C. 635, 636; *A. C. Jensen Rock & Supply Co.* v. *C., M., St. P. & P. R. Co.*, 273 I.C.C. 399, 401; and *Brennan & Corrigan* v. *Chicago & N. W. Ry.*, 155 I.C.C. 214.

competitive influences, the situation here, are not a proper measure of a maximum reasonable basis.*

The arbitrary and invalid character of the Commission's rate finding is further indicated by the apparent impatience of the Commission, on an erroneous theory, that appellants had escaped the burden of proof, and that this was a good reason for finding against them. The Government apparently makes no answer to this contention. The Commission could not lawfully penalize appellants and thus circumvent the statute when there was no suspension proceeding and in fact the burden of proof was on others (Jurisdictional Statement, pp. 30-31).

For the reasons stated in the Jurisdictional Statement and in this Reply, it is respectfully submitted that the order of the Commission is invalid under the rate-making provisions of the Act, as well as invalid in respect to the short-hauling provisions of section 15(4).

CONCLUSION

This case is one of great importance to appellants. They believe that fundamental errors have been committed by the Commission and that its order is invalid as involving a misconstruction of the Interstate Commerce Act, arbitrary action beyond its statutory powers, and a startling disregard of statutory standards.

Opposing railroad appellees having long since in large measure restricted their routes (e.g., L&N single-

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* See *Whatcom County Traf. & Rates Bur.* v. *C., M., St. P. & P. R. Co.*, 287 I.C.C. 442, 443 (competition of substitute fuels); *J. G. Christopher Co.* v. *Atlantic & D. Ry. Co.*, 289 I.C.C. 716, 718 (water competition); *Seaboard Mills* v. *Alabama G.S.R. Co.*, 293 I.C.C. 7, 13 (truck and water competition); and *Park Drop Forge Co.* v. *Pittsburgh & L. E. R. Co.*, 288 I.C.C. 405, 408 (water-truck competition).

line routes from mines to the Ohio River and to Atlanta, R. 152, 200) unjustly object to the restriction in routing here involved, although failing to protest such restriction before the tariff became effective.

They in substance oppose the Congressional purpose to provide protection of the common law right of railroads to long-haul participation—a purpose which they supported in opposition to one of the many attempts made by the Commission to eliminate the short-hauling provisions of section 15(4).

In April, 1938, an official of the Atlantic Coast Line, speaking for a number of railroads, including the railroad appellees here and also the Southern Railway, urged before a House Committee*—

> "We cannot with any reasonable assurance hold out to render the most expeditious service if our managerial rights are impaired, as will be the case if this bill is enacted" (p. 173).

Referring to freight handled by the Atlantic Coast Line he said:

> "The operation of our system presupposes the assurance of its long haul. The freight schedules and operations of trains are arranged on that presumption. Our rails are intersected by other lines at short intervals. One cannot travel as much as 75 miles on the Coast Line without crossing the tracks of another railroad. If we should be forced to participate with these other railroads in joint routes on traffic which we can handle more economically, more efficiently, and more expeditiously via our long-haul junctions, merely because we happen to connect with such other railroads for

* House Hearings on S. 1261, April, 1938, 75th Cong. 2nd and 3rd Sess.

entirely different purposes, it would simply undermine the premise upon which the Coast Line system was crystallized. * * *

"Because of competition with motor truck and water transportation, the Coast Line has been compelled to make very drastic reductions in the rates prescribed by the Interstate Commerce Commission on citrus fruit from Florida to points on the North Atlantic Seaboard and because of the low level of these reduced rates it is more necessary than ever that we be assured of our long haul on this traffic."

Congress did not eliminate the short-hauling provisions as proposed but in 1940 revised section 15(4) in its present form. The purpose of that section, as well as its terms, has been misconstrued and erroneously disregarded by the Commission in the present case.

The Motions of Appellees to affirm, appellants respectfully submit, should, therefore, be denied, the case should be considered by the Court on briefs and oral argument, and the Commission's order should be held to be invalid.

Respectfully submitted,

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December 4, 1957.

PROOF OF SERVICE

I, R. Granville Curry, one of the attorneys for appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 4th day of December, 1957, I served copies of the foregoing reply on the several parties hereto, as follows:

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